

SAINT REGIS MOHAWK TRIBAL COURT
IN AND FOR THE SAINT REGIS MOHAWK TRIBE

IN THE MATTER OF THE ESTATE OF

Case No.: 16-CIV-00012

██████████ SWAMP

DECISION AND ORDER

Deceased.

Procedural History

On October 5, 2016, ██████████, daughter and son of ██████████ Swamp (hereinafter ██████████ Swamp or decedent), filed a request for appointment/acknowledgment as administrator/executor of his estate, seeking to be appointed "co-administrators acting together" for their father's estate. They also filed consents for appointment of administrator signed by themselves, ██████████ ██████████, son of decedent and ██████████ Swamp, daughter of decedent. Each of those documents was signed July 18, 2016. ██████████ ██████████ are listed as the only survivors of decedent. On October 5, 2016, a document purported to be the Last Will and Testament of decedent, ██████████ Swamp, executed June 28, 2016, together with affidavits of subscribing witnesses to said Last Will and Testament was filed. Said Last Will and Testament designated ██████████ Swamp to act as executor thereof.

In addition, on October 5, 2016, a "complaint" was filed by [REDACTED] Swamp, daughter of the above decedent, seeking an order appointing this Court as executor of the above-named estate. [REDACTED] Swamp sought other relief, including money damages and a "cease and desist" order.

A notice of appearance on behalf of [REDACTED] and [REDACTED] Swamp was filed on October 5, 2016, by Peter J. Herne, Esq. who subsequently withdrew from representation of them.

A notice of appearance on behalf of [REDACTED] Swamp was filed on October 17, 2016, by Thomas B. Wheeler, Esq.

On October 24, 2016, [REDACTED] Swamp, through his attorney, filed, among other things, an answer and motion, respondent's affidavit of [REDACTED] Swamp, and attorney's affirmation challenging the validity of the purported Last Will and Testament of [REDACTED] Swamp, based on coercion, undue influence, and/or [REDACTED] Swamp's lack of capacity to execute same.

On March 3, 2017, this Court made an order granting temporary Letters of Testamentary to SRMT Chief Financial Officer, Michael Garrow, and further ordered said executor shall marshal and preserve the assets of, and debts against, said estate without authority, until further order of this court, to distribute such assets. Mr. Garrow subsequently sought to be removed as such temporary administrator and Virginia Gettmann, Esq. was then appointed as such temporary administrator with the same powers and limitations.

Based upon the challenge of [REDACTED] Swamp to the validity of such Last Will and Testament (hereinafter referred to as "Will"), the Court held a hearing on June 7 and June 26, 2017. Present at such hearing were [REDACTED], *pro se*, [REDACTED], *pro se*, and [REDACTED] [REDACTED] by and with her attorney, Thomas B. Wheeler, Esq. Each was allowed to present evidence.

The Court heard testimony from: [REDACTED], sister of decedent; [REDACTED], RN, Hospice nurse; [REDACTED], son of decedent; [REDACTED], Legal Aid Society of Northern New York; [REDACTED], sister of decedent; [REDACTED], daughter of decedent; [REDACTED], brother of decedent; and [REDACTED], son of decedent. The Court also received exhibits into evidence and heard the closing arguments of complainant, [REDACTED] Swamp, and respondent's counsel, Thomas B. Wheeler, Esq.

DISCUSSION

Testimony

[REDACTED] testified about her visits with her brother during his illness from the middle of April until July 5, 2016. She testified about her observations of his failing physical condition, his taking medication for his pain and about who was present in the home when she was there. She testified that after June 13, 2016, she saw a change in her brother's condition in that he was sleeping more, and he took increasing amounts of medication for his pain. She testified that Hospice began caring for [REDACTED]

Swamp in the middle of June 2016. She testified that she had many conversations with [REDACTED] Swamp, and that they often spoke in Mohawk. He spoke to her in May 2016 about his desire to have a will. He also talked about his land and said he was going to take care of that. At [REDACTED] Swamp's request, [REDACTED] King went to the Tribal land office and requested, and obtained, a printout of all lands owned by [REDACTED] Swamp. [REDACTED] King also testified about the preparation and keeping of notes regarding [REDACTED] Swamp during his Hospice care; those notes were received into evidence as Complainants' exhibit 1.

[REDACTED] Gibbons, Hospice nurse, testified the decedent was admitted to Hospice on [REDACTED] 2016. She testified that she was at [REDACTED] Swamp's home on June 28, 2016, when someone from the Office of the Aging (the Court believes it was [REDACTED] from Legal Services) arrived to "work on" [REDACTED] Swamp's Will. She testified that she was asked to step outside of [REDACTED] Swamp's room, and, therefore, did not know what had occurred. She testified about [REDACTED] Swamp's interaction with her; the fact that he was "bed bound"; the fact that he was not using his hands well; her belief that he was "confused" as to her conversation with him; and that she found him "very tired."

[REDACTED] Swamp testified that he did not see his father much because other family members kept him away. He testified as to who visited his father, although it is not clear that he was there at the same time. Whether he was at his father's home prior to his death is of no consequence to this Decision. [REDACTED] is the decedent's son and would inherit according to the Will or by intestacy depending on the validity of the will. He testified that he should be entitled to a home and not just the three acres of vacant

land designated in his father's Will based simply on the fact that he is decedent's son and deserves more according to his testimony. His complaint about the Will is that he is "not in it" (although he is) and that he was left "only a little land with nothing on it" and "where am I going to go?" He testified that the Will was not read aloud at the ten day feast held after [REDACTED] Swamp's death.

[REDACTED] is employed by Legal Aid Society of Northern New York in Canton, New York, as a paralegal. She testified that the Society has had a contract with the SRMT senior center for a number of years to provide legal services to members of the Tribe for the preparation of powers of attorney, health care proxies and last wills and testaments. In her capacity as such employee, she met with [REDACTED] Swamp on three occasions. She met him at the senior center initially earlier in 2016. At their first meeting he discussed with her the preparation of his Will. Present with him at the time was his grandson, [REDACTED] Swamp, whom, she testified, decedent asked to be present. At that time she met with decedent for 45 minutes; he told her what he wanted in his Will and how he wanted his property distributed. The second meeting took place at decedent's home in mid-June 2016 after the Will had been prepared as instructed. [REDACTED] testified that when she arrived at [REDACTED] Swamp's home most of his children were there; she asked them to leave so that she could speak with [REDACTED] Swamp. She testified that she read the proposed Will to [REDACTED] Swamp; she went over each provision with him; and she asked him if he wished to make any changes. She observed that [REDACTED] Swamp was concise about his instructions and, in fact, he changed one of the provisions of

[REDACTED] prepared Will regarding the remainder of his estate by adding his son, [REDACTED], and removing his grandson. [REDACTED] testified that she told [REDACTED] Swamp that she had to return to Canton to make the changes requested by him, and she set up another appointment to meet with him again after those changes were made. She testified she met with [REDACTED] Swamp for a third time, again at his home, on June 28, 2016. She asked those present to leave so that she could speak with [REDACTED] Swamp alone. She also described his turning to look in order to make sure everyone had left. She was alone with [REDACTED] Swamp for 30 minutes. She again read the proposed Will to him. She said he was very specific about what he wanted, and that he indicated the Will met with his approval. The two witnesses to the Will then arrived. She had prearranged with the senior center for them to be present. She indicated the Will was executed by [REDACTED] Swamp in the presence of the witnesses, who then also signed the Will as witnesses. That was done after he was asked if he had any questions before signing it. He indicated he had no questions and that he understood it was his Last Will and Testament and that he wished no additions or corrections to be made. He indicated he wished to sign it. [REDACTED] testified she handed [REDACTED] Swamp the prepared Last Will and Testament. He initialed the first page thereof before signing it. The witnesses then initialed and signed the Will as witnesses. They also signed the affidavit of subscribing witnesses. [REDACTED] further testified that after the execution of the Will, she had "light-hearted" conversation with [REDACTED] Swamp wherein he told her about building the log home;

he spoke with one of the witnesses about living in the "same neighborhood"; he spoke of the wildlife. The original executed Will was left with [REDACTED] Swamp.

[REDACTED] testified that she was friends with [REDACTED] Swamp for 50 years, and she did business with [REDACTED] Swamp for a number of years. He had requested that she be a part of handling his funeral preparation. She testified that she saw him two to three times a week in late 2015. He had discussions with her about losing his business and his son, [REDACTED], taking it over. He discussed his feeling about that with her. She saw him "quite a bit" in 2016 and from time to time after he became seriously ill. She last saw him on June 28 or 29, 2016. She received a call from [REDACTED] telling her that decedent wanted to see her. She visited with [REDACTED] Swamp for about two and a half hours; they had a "good conversation" in Mohawk. She said his speech was affected, but she could still understand him. She described him as alert; he talked to her about his pain, and he was watching television and talking about the contents of the program that was on. He told her that he had prepared his Will, and that [REDACTED] had taken it. He told her what was in it was nobody's business but his own, and they would know after his death when it would "come out." He did discuss with her the contents of his Will and why he had left things as he had. He spoke to her about his relationship with his sons and his grandsons. [REDACTED]

[REDACTED] He requested that, upon his death, she contact his grandson who would take care of things. She did as he requested. Further, she

testified about the customs and traditions of the Mohawk way of life insofar as what occurs after death, including the ten day dead feast that occurs on the tenth day after death. She testified that [REDACTED] Swamp was, like her, a member of the Wolf Clan. A Clan mother of the Bear Clan would, therefore, be the person who took charge at the ten day feast. That is what occurred. [REDACTED] was the speaker at the feast. She observed that [REDACTED] told [REDACTED] or decedent's grandson, [REDACTED] to get the Will; it was brought to the feast and [REDACTED] accepted decedent's Last Will and Testament at the feast; there was no objection to his accepting his Will. She kept minutes of the proceedings; the minutes were signed by her and [REDACTED]; and she gave copies of the minutes to the family. Those minutes were received into evidence as Respondent's exhibit B.

[REDACTED] testified concerning the customs and traditions of the Mohawk and the ten-day feast. She did not testify to direct evidence concerning the decedent. However, she said that all of the family members are supposed to work out any dissention among them prior to the ten day feast; at the ten day feast the speaker is supposed to set out the wishes of the decedent and get the family together; arguments and disagreement were no longer important; she said if the will is read aloud everyone has to agree. She opined that the family "must" agree. She said the family is obligated to settle disputes before the one-year anniversary of death. When asked what happens

if there is no agreement, there was no real answer. She seemed to be testifying that disputes must be, and always are, worked out by the family.

[REDACTED] testified concerning matters related to her family and a family meeting concerning her brother's health and the need for a schedule for them to provide help to him. She testified about the deterioration of [REDACTED] Swamp's physical condition. She testified about her visits with him and about a birthday party for him on June 11 or 12, 2016, which [REDACTED] Swamp attended. She also testified that she was present at the ten day feast and stated the Will was not read aloud.

[REDACTED] testified about June 28, 2016, when [REDACTED] arrived at her father's home. She testified that [REDACTED] asked her and other family members to leave and that [REDACTED] at her father's request, asked her to go back in for a short time during which her father asked her to explain where her land started. She observed her father "wasn't well." She then left the room again leaving her father with [REDACTED]. She did nothing further.

[REDACTED] testified that he was at the ten day feast and his brother's Will was not read aloud.

[REDACTED] testified and spoke about the fact that the opposing sides in this controversy are all family and need to work things out without the Court's involvement. The Court received into evidence complainant's exhibit 5, the certified medical records of [REDACTED] and complainant's exhibit 6, the certified medical records of [REDACTED].

[REDACTED] died on July 5, 2016. He executed a Last Will and Testament on June 28, 2016. The validity of that Last Will and Testament is challenged by decedent's sons, [REDACTED], on the grounds that their father was unduly influenced or coerced into signing it, and/or he was not of sound mind and memory such that he was incapacitated from executing a valid last will and testament. Complainants, [REDACTED], also argue that to follow the directives of decedent's Will would be outside the customs and traditions of the Mohawk community.

Applicable Law

There is currently no Saint Regis Mohawk Tribe (SRMT) Probate Law with respect to the settlement of estates, appointment of executors or final judgments. Thus, there is no tribal law to guide the Court in determining what constitutes a validly executed will. Without a specific probate law in place, this Court would have the authority to look elsewhere, to look to customs and traditions of the Mohawk community and to look to the law of other jurisdictions as may be appropriate. If that were not the case, the argument that there is no way to determine under Mohawk law whether a will is valid would result in the determination that no member of SRMT could ever execute a valid last will and testament for the distribution of his/her estate. That makes no sense.

A Last Will and Testament must be valid in its creation and execution. A person making a will must be of sound mind; he must understand what he is doing; must under-

stand the contents of the will; and must intend to be making a will for the distribution of his property. For example, New York Consolidated Laws Estates Powers and Trusts (EPTL), Section 3-1.1 states that "Every person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property." New York EPTL Section 3-2.1 sets out the formal requirements for the execution and attestation of wills. All of that conforms to the requirements set out in SRMT Land Laws and Land Dispute Ordinance (SRMT LL&LDO).

The SRMT LL&LDO sets out principles of inheritance and the criteria for competence to execute a will. It specifically states: "Pending the adoption of a probate law, the Tribe shall use the following rules of inheritance:" SRMT LL&LDO Section V. SRMT LL&LDO Sections V(A)(1-8) specifically set out will requirements, including the attestation thereof. The testimony of [REDACTED], as well as the affidavit of attesting witnesses, indicates that the formalities required for the execution of a will were followed in this case. Section V(B)(2) sets out the capacity to make a will:

Any person eighteen (18) years of age or a minor lawfully married and of sound mind may make a Will. "Sound mind" generally means someone who has not been deemed incompetent in a prior legal proceeding.

There has been no testimony to indicate that [REDACTED] Swamp was ever deemed incompetent in a prior legal proceeding. There was no proof before the Court that [REDACTED] Swamp was unduly influenced or coerced in any way into making his Will. Quite the

contrary. The testimony of [REDACTED] and the testimony of [REDACTED] sufficiently show the Court that [REDACTED] Swamp was fully aware of what he was doing. While [REDACTED] Gibbons did testify that she was concerned because she knew [REDACTED] Swamp was signing a will, her testimony provided no proof that [REDACTED] Swamp was anything less than competent. The Court has reviewed the [REDACTED] records received into evidence. While [REDACTED] Swamp was deteriorating physically, as of June 13, 2016, after his initial discussions with [REDACTED] but before the execution of his Will, he was described as "[REDACTED]" [REDACTED] Records (complainants' exhibit 5). As of June 17, 2016, [REDACTED] Swamp was described as "[REDACTED]" and reporting his [REDACTED] to his [REDACTED] provider. As of June 22, 2016, [REDACTED] Swamp was making his own decisions regarding his medical care [REDACTED] [REDACTED] with regarding to Hospice care. As of June 23, 2016, [REDACTED] Swamp was able to describe [REDACTED] nurse. [REDACTED] (complainants' exhibit 6). There is no indication in any [REDACTED] records that [REDACTED] Swamp was anything but competent.

This Court has carefully considered all of the testimony of the various witnesses, including the complainants, as well as the exhibits received into evidence. Except for the stated "concern" of [REDACTED], all of the evidence presented with respect to [REDACTED] Swamp's condition indicates that his mind was sound and he knew exactly what he was doing. Complainants claim that his medication reduced his ability to function and think clearly. However, his first meeting with [REDACTED] earlier in 2016, in which he told her

what he wanted in his Will and how he wished to dispose of his property, was before there was any question of [REDACTED] affecting his abilities. All of the testimony with regard to purported diminished capacity presented was directed to June 28, the day he executed his Will. [REDACTED] testified to her interaction with [REDACTED] Swamp at their initial meeting and again mid-June when she first reviewed the proposed Will that had been prepared pursuant to his earlier instruction. At the mid-June meeting when she reviewed the proposed Will with [REDACTED] Swamp he did, indeed, request a modification to the remainder clause proposed, removing a grandson and adding his son as a devisee. She testified that she observed that [REDACTED] Swamp was very concise about what he wanted. She testified about the execution of his Will on June 28. Supporting her testimony is that of [REDACTED] with whom [REDACTED] Swamp spoke after the execution of his Will. He told her that he had made his Will. Not only did he tell her he had made his Will, but he told her why he had devised his property as he had; he told her it was nobody's business to know the contents of his Will before his death; and upon his death it would "come out."

There has been no proof before the Court that [REDACTED] Swamp has ever been declared/adjudicated incompetent in any prior court proceeding. There has been no proof of undue influence or coercion upon [REDACTED] Swamp by anyone. There has been no proof of any lack of competence of [REDACTED] Swamp at the times he conferred with [REDACTED] or at the time of the execution of his Last Will and Testament. To the contrary, the proof before the Court shows that [REDACTED] Swamp was of sound mind and knowingly

executed his last will and testament on June 28, 2016, with all formalities required by law, including SRMT LL&DO.

Customs and Traditions

The Court can, and should, also consider the customs and traditions of the Tribe, which complainants have invoked here. The testimony of [REDACTED] and [REDACTED] set out the Mohawk customs and traditions as they relate to the passing of an individual and the ten day feast. Both witnesses spoke of the situation where the decedent has a will. While their testimony was not exactly the same, it also did not differ in the hope for family reconciliation and the need for the spirit of the deceased to be free. Ms. Garrow, as indicated previously, testified that she took minutes of the ten day feast. The minutes are entitled "TEN DAY DEAD FEAST; [REDACTED] SWAMP" and read in part:

[REDACTED] daughter, [REDACTED] (sic) brings a paper/Will made by [REDACTED]. He decided how the Family will split his property. [REDACTED], you decided where your property would go and filed the paper and we must respect your wishes and accept this paper.

There is no indication in the minutes of any challenge to the Will made by complainants, or anyone else, at the ten day feast.

The Ten Day Dead Feast followed the customs and traditions of the Mohawk community, particularly Kaienerekowa Longhouse. [REDACTED] testified that the family "must" work together to become unified so that the wishes of the decedent are done.

When the Court asked about dissention among family members, she seemed to say they just had to get over it. That has not happened. However, when the speaker at the Ten Day Dead Feast, [REDACTED], accepted the document designated as [REDACTED] Swamp's Last Will and Testament, there was acknowledgement that [REDACTED] Swamp had decided where his property would be distributed and that his wishes must be respected. There was no objection raised at that time.

CONCLUSION

Based upon the foregoing, it is the judgment of this Court that the Last Will and Testament of [REDACTED] Swamp is valid and shall be accepted by this Court as such. [REDACTED] Swamp, the named executor, signed a consent that she and [REDACTED] Swamp act as co-executors. It is obvious that any of the children of [REDACTED] Swamp are not appropriate or able to act as executor of their father's Last Will and Testament.

NOW, THEREFORE, it is

ORDERED AND ADJUDGED that the complaint of [REDACTED] Swamp and [REDACTED] Swamp challenging the validity of the Last Will and Testament of [REDACTED] Swamp executed June 28, 2016, be, and hereby is, dismissed; and it is

ORDERD AND DECREED that Letters Testamentary shall be issued to Virginia A. Gettmann, Esq., 40 Main Street, Massena, NY, with all powers to administer and distribute the estate of [REDACTED] Swamp; and it is further

ORDERED AND DECREED that the heirs of [REDACTED] Swamp shall cooperate with and provide to Attorney Gettmann all accounts, funds and information now or previously in his/her possession or account(s) except as previously provided to Attorney Gettmann.

Signed by my hand this 17th day of August, 2017.



Barbara R. Potter
Associate Judge
Saint Regis Mohawk Tribal Court

The parties have thirty (30) days from entry of this order to file an appeal with the Saint Regis Mohawk Appellate Court.